

STATE OF MICHIGAN
COURT OF APPEALS

MARY HESS,

Plaintiff-Appellant,

v

CITY OF SALINE,

Defendant-Appellee.

UNPUBLISHED

May 12, 2005

No. 260394

Washtenaw Circuit Court

LC No. 03-000787-CZ

Before: Murphy, P.J., and White and Smolenski, JJ.

PER CURIAM.

Plaintiff filed this action under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, to obtain a copy of a videotape made during a city council meeting. Plaintiff moved for summary disposition under MCR 2.116(C)(9) and (10), but the trial court granted summary disposition for defendant under MCR 2.116(I)(2). Plaintiff appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

The parties generally agree on the underlying facts. On June 16, 2003, defendant's city council held its regular meeting in its chambers in the city hall. Certain city staff members were in attendance at the meeting. Defendant regularly allows an independent party to videotape the council meetings so that they may be broadcast over the local cable television station.

During the meeting on June 16, 2003, the council decided to go into a closed session in a private room. During that time, the public was allowed to remain in the council's chambers. While the council was in closed session, the video recording equipment remained on in the chambers. The camera was pointed at the empty chairs of the mayor and other council members. Plaintiff believes that conversations among city staff members were recorded on the videotape equipment. After the meeting, the unedited version of the tape was turned over to the local cable television station and broadcast at least twice to local residents. The videotape was subsequently pulled from the air and edited to delete the employees' conversations during the time the council was in closed session.

Plaintiff is a member of the city council and learned that another member of the council was provided with a copy of the unedited videotape. Plaintiff filed this action when her request for a copy of the videotape was denied. The trial court granted defendant's motion for summary disposition, agreeing with defendant that the unedited videotape containing conversations not occurring during the council meeting itself was not subject to disclosure under the FOIA.

This Court reviews a trial court's decision on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Plaintiff moved for summary disposition under MCR 2.116(C)(9) (failure to state a valid defense), and MCR 2.116(C)(10) (no genuine issue of material fact). A motion under MCR 2.116(C)(9) is limited to the pleadings. *Slater v Ann Arbor Public Schools Bd of Ed*, 250 Mich App 419, 425-426; 648 NW2d 205 (2002). A motion under MCR 2.116(C)(10) tests the factual support for a claim. Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). Because the trial court considered materials beyond the pleadings when granting summary disposition, MCR 2.116(C)(10) is the appropriate rule to apply.

Under the FOIA, public bodies are required to disclose all public records that are not specifically exempt from disclosure. *Sclafani v Domestic Violence Escape*, 255 Mich App 260, 264; 660 NW2d 97 (2003). The term "public record" is defined in MCL 15.232(e) as follows:

"Public record" means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software. This act separates public records into the following 2 classes:

- (i) Those that are exempt from disclosure under section 13 [MCL 15.243].
- (ii) All public records that are not exempt from disclosure under section 13 and which are subject to disclosure under this act.

The term "writing" defines a public record, and MCL 15.232(h) adopts a broad definition of that term. A writing includes "photographing, photocopying, and *every other means of recording*." *Id.* (Emphasis added.) *Therefore*, there is no question that a videotape can constitute a public record.

Defendant refused to release the unedited videotape at issue, contending that it was not a public record by definition because it was not prepared "in the performance of an official function." MCL 15.232(e). It is the "ownership, use, possession, or retention [of the writing] in the performance of an official function that is determinative." *Detroit News, Inc v Detroit*, 204 Mich App 720, 724; 516 NW2d 151 (1994).

We agree that the unedited videotape was not a public record. The unedited version of the videotape includes the segment where the city council had adjourned and was conducting its official business outside the chambers. Although the chambers remained open to the public during this period, no official city business was conducted during that time. Accordingly, that portion of the videotape does not meet the definition of a public record in MCL 15.232(e).

Plaintiff argues that because the unedited version of the videotape was broadcast over cable television for residents to see, the videotape was therefore made a public record. We disagree. There appears to be no dispute that defendant was unaware that employees' conversations were included on the unedited version of the videotape. The videotape was also made and broadcast by a third party, not defendant.¹ More importantly, there is no basis to conclude that the broadcast of the entire unedited version of the tape involved the performance of an official function, which is the test for a public record. If plaintiff cannot satisfy the test for a public record, the inadvertent release of information is not a basis for converting a nonpublic record into a public record under the FOIA. *Detroit Free Press, Inc v Dep't of Consumer & Industry Services*, 246 Mich App 311, 318-319 n 5; 631 NW2d 769 (2001).

Although the unedited version of the videotape was broadcast on the local cable television station for residents to view, that broadcast was an inadvertent release of the information contained in the tape recording, and the videotape is not a public record for this reason. For the same reason, the release of the unedited tape to another council member does not make the unedited videotape a public record. Cf., *Federated Publications, Inc v Lansing*, 467 Mich 98, 112-113; 649 NW2d 383 (2002) (the intentional release of requested records to the plaintiff by the defendant prohibited the Court from transforming "disclosed records into nondisclosed records.")

Because the unedited version of the videotape is not a public record, defendant was not required to provide it to plaintiff in response to her request under the FOIA.

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Michael R. Smolenski

¹ The record does not support plaintiff's claim that defendant intentionally broadcast the unedited version of the videotape. After learning that the unedited videotape was broadcast, defendant's city manager requested that the television station edit the tape and only broadcast those portions of the tape showing the city council in session.